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ABSTRACT

This paper presents an overview of the General Agreement on Trade in Services (GATS) trade agreement, Canada's current negotiating position, and implications for higher education in Canada related to the GATS. The first section highlights the key contributions that Canada's higher education system currently makes to national economic, social, and cultural development. The second section examines the three major forces shaping global trade in education services. The third section provides background information on the GATS and explains the key elements of this complex agreement. The fourth section addresses the status of the negotiating process and key issues related to Canada's position on education services. The fifth section highlights some areas of concern with respect to the potential impact of the GATS on higher education in Canada, and outlines some possible scenarios and outcomes for Canadian universities. The final section looks at how commitments in other service sectors such as research and development services, professional services, and computer and related services could have implications for Canadian universities. This discussion on higher education and the GATS takes both short-term and long-term perspectives with respect to the impact of GATS on Canadian higher education. (Contains 47 footnotes.) (SLD)

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An Update on Canada's Position and Implications for Canadian Universities

May 2003

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The GATS and Higher Education in Canada: An Update on Canada's Position and Implications for Canadian Universities

Introduction

AUCC, the national association representing 93 universities and university-degree level colleges in Canada, has been monitoring the General Agreement on Trade in Services (GATS) over the past three years and has prepared two documents related to this issue, *Canadian Higher Education and the GATS: AUCC Background Paper* (2001) and a *Joint Declaration on Higher Education and the General Agreement on Trade in Services* (2001) in partnership with the American Council on Education (ACE), the European University Association (EUA), and the Council for Higher Education Accreditation (CHEA). This declaration seeks to set out a platform of principles guiding the globalization of higher education. It calls for a freeze in GATS negotiations in trade in education services and, instead, advocates establishing mechanisms for cooperation to address any barriers encountered within an international education policy framework rather than within a trade policy regime.

This paper presents an overview of the trade agreement, Canada's current negotiating position, and implications for higher education in Canada related to the GATS. The first section highlights the key contributions that Canada's higher education system currently makes to national economic, social and cultural development. The second section examines the three major forces shaping global trade in education services. The third section provides background information on the GATS and explains the key elements of this complex agreement. The fourth section addresses the status of the negotiating process and key issues related to Canada's position on education services. The fifth section highlights some areas of concern with respect to the potential impact of the GATS on higher education in Canada, and outlines some possible scenarios and outcomes for Canadian universities. The final section looks at how commitments in other service sectors such as research and development services, professional services and computer and related services could have implications for Canadian universities. This present discussion on higher education and the GATS takes both a short-term and long-term perspective with respect to its analysis of the impact of the GATS negotiations on the Canadian higher education system given the overarching commitment to progressive liberalization in successive rounds of negotiations in the GATS process.

Trade in higher education services has grown over the last few years into a market estimated in 1999 at $30 billion worldwide. In Canada, most exports of education services currently take place through foreign student enrolment in Canadian institutions. In 1999-2000, the year the most recent statistics are available, there were a total of 59,845 international students at the post-secondary level in Canada.[1] International students contribute approximately $3.5 billion to the Canadian economy annually.[2]

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[1] Canadian Bureau for International Education, *National Report on International Students in Canada 2000/2001*, Ottawa, 2002. Data is from Statistics Canada and represents college and university students.
[2] CEC Network, *Perspectives: the Value of International Students*, 2001. According to the Department of Foreign Affairs and International Trade (DFAIT), $ 3.5 billion is a conservative number and the contribution could be as high as $4.3 billion per year. This estimate is based on the assumption that each foreign student contributes $25,000 to the Canadian economy.

Currently, education services are not listed in the Canadian schedule of commitments adopted under the GATS in 1994. In addition, the Canadian government made no requests for market access in July 2002, and did not make offers in education services in their initial conditional offer released on March 31, 2003.[1]

I. Canadian Universities: The Foundation of Canadian Society

The Canadian higher education system serves the broad public interest in a number of key ways. It is the critical intellectual underpinning for the economic, social and cultural development of Canadian communities. Through their teaching, research and community service, universities make a vibrant and energetic contribution to Canada's future success. In a global knowledge society, university education is increasingly the ticket to success, both for individuals and for the country as a whole.

Canadian universities educate more than one million people every year including full time, part-time and adult lifelong learners. Personal benefits of a university education go well beyond the broad economic advantages. Individuals with a university education, on average, live longer healthier lives and overall enjoy a better standard of living. Canadian universities also play an important role in fostering democratic values, critical thought and debates, and preparing engaged citizens.

Community service has been the hallmark of Canadian universities. Universities play essential roles in their local, provincial, regional and national communities and empower them to be successful players in a global knowledge society. Professors, staff and students alike make their expertise available, establishing linkages with business, industry, government, arts and cultural groups, social agencies and other non-for-profit groups. In fact, universities are often important part of the glue that holds a community together. Campus facilities are vital resources with theatres, museums, art galleries, concerts, public lectures, exhibits, libraries and athletic facilities enriching their towns and cities beyond economic contributions.

Over the last 20 years, the ability to learn, to generate new knowledge and to market innovation have become critical drivers of the international economy. Universities play a central role in the development of this learning society and knowledge economy. The job growth for university graduates will not be limited to highly technical fields. Changes in the delivery of health and social services, the development of sustainable solutions to environmental concerns, and challenges in dealing with innovation in the workplace all contribute to solid growth in a wide range of occupations for university graduates. The areas with the fastest growth in full-time employment during the 1990s were health, social sciences, education and government occupations, as well as management, recreational and natural sciences occupations. Notably, these are the very occupations that require the highest levels of education (30 to 70 percent of employees in these occupations hold university degrees). Federal and provincial governments project that over the next five years the proportion of new jobs requiring university degrees will grow to 25 percent, up from 17 percent of existing jobs.

Finally, Canadian universities are a $16 billion enterprise. At the national level, the contribution of the university sector to the Canadian gross domestic product is comparable to many major industries or sectors. Universities' contribution to national GDP is larger than the pulp and paper

[1] DFAIT, *Canada Makes Public its Requests in WTO Services Negotiations*, Press release no.78, July 8, 2002. http://www.dfait-maeci.gc.ca

industry, the forestry and logging, and such prominent manufacturing industries as the motor vehicle, furniture or plastic product industries. At the regional and local levels, universities have also significant direct and indirect economic impacts.

II. Key Trends Shaping Trade in Education

Major changes in conditions affecting the context of higher education, adult and continuing education give the GATS a potentially critical role in those areas around the world. Changes relate to 1) globalization 2) improvements in information technology and communication and 3) increased competition in higher education.

***Globalization*:** In a world in which globalization is increasing rapidly, with expanding mobility of people, access to knowledge across borders, increased demands for higher education (including e-learning), growing worldwide investment, increased needs for adult and continuing education, the opportunities and capacities to expand the market for higher education have also increased tremendously. That growth will increase even more rapidly over the next few years. According to a recent World Bank report on challenges for tertiary education, opportunities arise as the role of tertiary education in the construction of knowledge economies and democratic societies is more influential than ever. On the other hand, developing countries that cannot take advantage of these opportunities will likely see their knowledge gap increase.[4] For developed countries like Canada, globalization provides opportunities for universities to expand their international activities, while carrying the risk of diminishing sovereignty over national standards and policy regulatory capacities.

***Information technology and communications*:** The rapid worldwide expansion of new information technology, improvements in communications technology and the reduced cost of much of this technology have spawned a major expansion in its use in education. In many parts of the world, the opportunities provided by information technology hold promise for reaching populations that could not be served by traditional education institutions. This technological boom has also led certain companies such as Microsoft to create private technical education centres. Microsoft's 1,700 *Certified Technical Education Centers* show how firms are moving into the vocational education market. These private centres operate as Microsoft franchises, with a training programme drawn up by Microsoft and taught by Microsoft-accredited staff.[5]

Increasing competition: Competition in higher education has increased markedly in recent years in the United States, Europe, Latin America, and Asia as policymakers turn to market forces to reform higher education and cut costs.[6] Competition from foreign institutions is of special concern to developing nations. They may fear that competition from providers in developed countries will disadvantage their still-developing higher education systems. If outside providers succeed in recruiting the better prepared and more affluent tuition-paying students away from public institutions, they will deprive government-supported higher education of revenue needed to support public education for poor and less prepared students. However, in some cases, a country might open the education sector in the hope that foreign providers will support the

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[4] World Bank, *Constructing Knowledge Societies: New Challenges for Tertiary Education,* Washington D.C, 2002.

[5] Larsen, Kurt and Vincent-Lancrin, Stephen, *International Trade in Education Services: Good or Bad?,* UNESCO, 2002.

[6] Newman, Frank and. Couturier, Lara K, *Trade Public Good in the Higher Education Market,* The Observatory on Borderless Higher Education, January 2002, p.1. http://www.obhe.ac.uk

development of the higher education system. Developing nations are also concerned that it will open the door to foreign diploma mills and providers of questionable quality, which these countries do not yet have the capacity to monitor or police. Thus, the GATS is seen as hindering their commitments to the 'public good', to the development of a national higher education system essential to national development, as well as hindering their efforts to foster national cultural values, promote democracy, and provide educational opportunities for all citizens.[7]

This trend is not only a concern for developing countries. For developed countries like Canada, while increased competition brings a broader range of choice for students and a potential for increased access, a possible challenge relates to maintaining high quality standards and ensuring adequate financial support for the public higher education system.

III. Overview of the GATS

After World War II, the major powers worked together to liberalize trade, focusing on industrial goods in eight rounds of multilateral negotiations under the General Agreement on Tariffs and Trade (GATT). The GATT agreement began in 1947 with a small group of the world's major trading powers; by 1994 it had expanded to 128 members. In 1995, during the Uruguay round, the GATT was replaced by the World Trade Organization (WTO). At the time, a decision was made to broaden the talks to include trade in services and to expand participation. This was done under the umbrella of the WTO through the GATS, which was set up as the framework for negotiations on trade in services. Setting up a trade discipline in services has been a much more challenging exercise than establishing a trade regime on products. The GATS is still an incomplete agreement as it is has proven difficult for each member to find a balance between opening services and maintaining government control over regulations in these areas.

The GATS aims at expanding free trade in services, opening markets, and facilitating economic growth. The goals for higher education as a service include removing restrictions on market access and barriers to competition.[8]

Once a nation becomes a member of the GATS it is subject to the *general obligations* of this agreement (see below) and makes specific commitments regarding *market access* and *national treatment* in specific sectors (such as education). There are costs to not taking part of the GATS: a country outside the agreement risks not having equal access to those markets and losing favourable or unfettered access to markets in critical export areas.

How does the GATS work?

The 144 participants agree to abide by the basic general obligations of the GATS (e.g. *most favoured nation treatment-MFN*) and make commitments for specific sectors to eliminate or reduce tariffs and other impediments to trade in services. There is a hierarchy of obligations with general obligations applying to all members, followed by commitments specified by each member. Specific commitments serve as the basis for negotiations between member countries that are signatories to the GATS. In more detail, the two levels of obligations are:

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[7] ACE, *An Overview of Higher Education and GATS*, 2002.
[8] Ibid

General obligations that apply to all services (e.g. MFN and transparency). MFN treatment requires that members "accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than it accords to like services and service suppliers of any other country".[9] Thus, GATS members are entitled to conditions of access equal to the most favourable given to any other nation.[10] These rules are considered "top down" as they apply to all services even those for which a country has not specified any commitments in its schedule.

Specific commitments are scheduled commitments to *market access* and *national treatment* for specific sectors (such as education services). These are identified by each government in its *Schedule of Specific Commitments*. Government commitments to date have ranged from a few to 120 of the 160 service sectors (including sub-sectors). All WTO Members are required to submit a schedule of commitments which lay down *market access* and *national treatment* obligations in sectors listed, as well as horizontal limitations and restrictions to MFN, market access and national treatment. National treatment and market access obligations are "bottom-up" measures as they apply only to sectors specified in the schedule.

Extending *national treatment* means that 'each member shall accord to services and services suppliers of any member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own like services and service suppliers".[11] Thus, foreign service suppliers must be treated in the same way a nation's own service suppliers are treated including extending the same advantages e.g. access to public funding. However, it is possible to specify in the schedule a limitation on national treatment (such as a restriction to access to public subsidies for foreign service providers).

Market access is a negotiated market commitment in specific service sectors. It may be subject to various limitations such as number of service suppliers, value of transactions, total number of service operations, total number of people that may be employed in a particular service sector, and the participation of foreign capital. Members are free to tailor sector commitments as they wish, as long as the limits are stated at the outset. They may encounter pressure from other members regarding such limitations. Each member may make additional commitments to provide access beyond the listed measures.

What is progressive liberalization?

The fundamental goals of the GATS include expanding the areas covered and achieving the progressive elimination of tariffs and other barriers. While there is no time limit on the GATS, Article XIX commits members to successive rounds of services negotiations with the aim of achieving progressively higher levels of liberalization of trade rules. Thus, even those areas for which exclusions are sought are potentially subject to elimination as trade restrictions are lifted. Therefore, it is foreseeable that Canada will be under increasing pressure in this round and future rounds of negotiations to eventually make commitments in areas such as commercial education or training services and extend market access and national treatment to foreign service providers.

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[9] GATS, Article II: 1, April 1994.

[10] Under certain circumstances nations may seek specific exemptions, but these must be granted prior to the effective date of the agreement and cannot exceed ten years. In addition, under article II:3, members can accord advantages to adjacent countries in order to facilitate exchanges.

[11] GATS, Article XVII: 1, 1994.

Given this context, this paper attempts to take both a shorter and longer term perspective in its analysis of possible scenarios and implications for Canadian higher education.

What service sectors are covered by the GATS?

The GATS applies in principle to all service sectors with certain exceptions. 1) "Services supplied in the exercise of governmental authority" which are services not supplied on a commercial basis or in competition with other suppliers, such as social security and, in many countries, other public services such as health or education that are provided under non-market conditions. 2) Air transport services exempted from coverage are measures affecting air traffic rights and services related to air traffic rights.

The classification of services is currently based on the United Nations Central Product Classification (CPC) System. This system includes twelve service sectors, which are further divided into 160 sub sectors. The twelve sectors are as follows: education, business, communications, construction and engineering, distribution, environment, financial, health, tourism and travel, recreation, cultural and sporting, and transportation services.

What are the education service sub-sectors?

The sub-sectors in education are as follows: *primary, secondary, higher education* (including post-secondary technical and vocational education services), *adult education* (e.g. education for adults outside the regular education system), and *other education* (e.g. testing, certification). Governments can make commitments for one, several, all sectors, or none of them. In addition, countries can also improve and supplement the UN CPC definitions. For example, Norway, Switzerland and Thailand have made additional distinctions beyond the five educational services sub-sectors listed by the CPC.

What type of services can be traded?

The GATS distinguishes between four '**modes of supply**' through which services can be traded. Examples in parentheses apply specifically to the education sector.

Mode 1: Cross border supply (e.g. distance education);
Mode 2: Consumption abroad of services by consumers traveling to supplier's country (e.g. foreign students in Canadian institutions);
Mode 3: Commercial presence (e.g. a campus abroad);
Mode 4: Presence of natural persons from supplying country in consuming country (e.g. faculty teaching abroad).

IV. Update on the Negotiating Process and Canada's Position

What is the status of the current round of negotiations?

This current round of negotiations was launched in 2000. The meeting in Doha, Qatar in November 2001 established the timetable for this round of negotiations scheduled to end in 2005.

Initial *requests* to remove trade barriers in specific services in countries of interest to Canada were presented to these countries before the deadline of June 30, 2002. Canada presented initial requests to over 60 countries in foreign markets identified by Canadian services providers. Canada also received specific requests which have been reviewed by Canadian trade negotiators. Through the fall of 2002 and early 2003, bilateral discussions were held with Canada's trading partners to gain a clear idea of the liberalization requests on the table.[12] Each member was to submit a conditional initial *offer* of greater access to their service markets by March 31, 2003. Canada has made public its requests and its conditional offer.

Active negotiations will commence after members release their conditional offer of access to service markets. These negotiations will take place in a series of bilateral meetings likely to start in mid-2003. The Fifth WTO Ministerial Conference, to be held in Cancún, Mexico in September 2003, will take stock of progress in negotiations and discuss improving offers which are likely to be viewed as not forthcoming enough by partner countries.

In what areas has Canada made requests and offers?

For the Doha round of negotiations, Canada has made requests for market access in 12 sectors including professional services, computer and related services, research and development services, business services (especially management consulting services, oil and gas services, and mining services), courier services, telecommunication services, distribution services, environmental services, financial services, tourism and travel-related services, and transport services.[13]

On March 31, 2003, Canada made public its initial conditional offer including improved market access commitments in: financial services, business services, communication services, construction services, distribution services, tourism and travel related services, and transport services.[14]

The following sectors are of interest to the higher education system in Canada. They will be reviewed in detail later in this paper.

- Research and Development services
- Professional services
- Computer and related services

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[12] Update on World Trade Organization (WTO) Negotiations, http://www.dfait-maeci.gc.ca/tna-nac/bulletin-e.asp

[13] For more information on Canada's commitments in other sectors, see http://www.dfait-maeci.gc.ca – Trade in services.

[14] DFAIT, *Canada Releases its Initial Offer in WTO Services Negotiations*, Press release no. 33, March 31, 2003, www.dfait-maeci.gc.ca

What is Canada's negotiating position with respect to the education sector?

According to DFAIT's press release:

> *"Consistent with the position outlined by the Government of Canada in March 2001, no offers will be made on Canada's health, public education, social services or culture. In addition, Canada is not seeking openings in these areas in the GATS negotiations."* [15]

Canada is not seeking commitments nor will it present offers to its trading partners in these three sectors. This position was reiterated in ongoing discussions with senior trade officials at DFAIT throughout the fall of 2002. AUCC understands that this position applies to the overall round of negotiations schedule to end in 2005, and not only to the request and offers process ended on March 31, 2003.

To what extent have other countries made commitments in the education sector?

Generally speaking, education is one of the least committed sectors. Only 44 countries have scheduled commitments in education and 21 (counting the EU for 1) of these have included commitments to higher education.[16] Some countries such as Congo, Lesotho, Jamaica and Sierra Leone have made full unconditional commitments in higher education, perhaps with the intent of encouraging foreign providers to help develop their educational systems.[17]

Only four (USA, New Zealand, Australia and Japan) of the 21 countries with higher education commitments have submitted a negotiating proposal outlining their interests and issues. The four proposals[18] underline the need for governments to retain their sovereign right to determine their own domestic educational policy, a right which is also confirmed in the provisions of the WTO. Australia believes that governments must retain their sovereign right to determine their own domestic funding and regulatory policies and measures. New Zealand claims that the reduction of barriers to trade in education does not equate to erosion of core public education systems and standards. The United States' proposal envisions that private education and training will continue to supplement, not displace, public education systems. Finally, Japan suggests that any measures in the education services sector should be considered with primary interest in maintaining and improving quality.[19]

In terms of specific commitments, the European Union has included higher education in its schedule with clear limitations on all modes of trade except "consumption abroad", which generally means foreign fee paying students. Under mounting public pressure, the European Union Trade Commissioner recently announced that the EU would not further commit Europe's

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[15] DFAIT, , *Canada Makes Public its Requests in WTO Services Negotiations,* Press release no.78, July 8 2002, www.dfait-maeci.gc.ca

[16] WTO, *Education Services: Background Note by the Secretariat,* September 1998, http://www.wto.org

[17] Knight, Jane, *Trade in Higher Education Services: The Implications of GATS,* The Observatory on Borderless Higher Education, March 2002, http://www.obhe.ac.uk.

[18] The proposals are available to download at http://www.wto.org

[19] Nyborg, Per, *GATS in the Light of Increasing Internationalization of Higher Education,* OECD/US Forum on Trade in Educational Services, May 2002.

health and education sectors to the GATS. [20] The United States has had commitments in its 1994 schedule in adult education services and other services. In the conditional offer released on March 31, 2003, the U.S. 'considers including commitments in higher education services'. Australia's commitment for higher education covers provision of private tertiary education services, including university level. Australia and New Zealand, which both had commitments in education services in their 1994 schedules, have not further extended their commitments in that sector. Japan, for its part, offers to make commitments on 'adult educational services' and "other education services" in general, where in the past it has only made commitments with respect to "foreign language tuition services for adults".[21]

It is important to note that AUCC's partner associations in the United States and Europe have raised similar concerns about addressing the globalization of higher education in the context of a trade policy regime. ACE also prepared a position paper on GATS and the higher education system in the United States.[22] ACE, CHEA, EUA and AUCC have all asked their respective countries not to make commitments or not to increase commitments in the education services sector, in higher education services or in the related categories of adult education and "other" education services.

What are the trade barriers encountered in the education services sector?

The GATS has the potential to remove major obstacles to the export and import of services. With respect to the education services sector, certain barriers have been identified by the WTO including[23]:

- Immigration requirements for students, foreign currency controls, the inability to obtain a national license (e.g. to be recognized as a degree/certificate granting educational institution), measures limiting direct investment by foreign education providers (e.g. equity ceilings), nationality requirements, needs tests, restrictions in recruiting foreign teachers and the existence of government monopolies and high subsidization of local institutions.

What trade barriers have been encountered by Canadian universities?

While there are currently some barriers to trade in education services, these do not appear to be a major problem overall for Canadian universities exporting education services abroad.[24] The barriers identified seem to be related more to a lack of recognition of academic qualifications and concerns over quality. Although Canadian exporters of education and training do not appear to be

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[20] European Union, Press release, February 5, 2003, *WTO Services: Commission Submits Draft Offer to Council and Parliament - Public Services Fully Defended*, http://europa.eu.int

[21] Ministry of Foreign Affairs of Japan, *WTO Services Trade Negotiations: Outline of Japan's Initial Offer*, available at http://www.mofa.go.jp/policy/economy/wto/submit0304.html

[22] American Council on Education (ACE), *An Overview of Higher Education and GATS*, 2002.

[23] WTO, *Education Services: Background note by the Secretariat*, op.cit.

[24] AUCC conducted a survey in June 2001 to gain a better understanding of the trade barriers faced by Canadian universities in their international commercial activities. For more information, please contact pjohnsto@aucc.ca.

unduly hindered, a number of education providers in countries more active in education exports such as the United States, the United Kingdom and Australia have identified certain obstacles.[25]

AUCC, along with the other signatories of the *Joint Declaration*, [26] has argued for a rules-based and cooperative approach which addresses the reduction of obstacles to globalization of higher education by using conventions and agreements outside a trade policy regime. This approach includes, for example, improving communications, expanding information exchange, and developing agreements concerning higher education institutions, programs, degrees or qualifications and quality review practices.

V. Potential Scenarios and Implications for Canadian Universities

This section attempts to highlight some questions of concern with respect to the potential impact of the GATS on higher education in Canada and outlines some possible scenarios should certain negotiating positions be taken with respect to education services.

1. *Does Article 1:3 "Services offered under government authority" mean that the Canadian higher education system is exempt from the GATS?*

As mentioned in section III, the GATS applies to all service sectors *except* services supplied in the exercise of governmental authority which means 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'. Overall, it is not clear how Article 1:3 could protect the higher education system in Canada, and the question of what exactly this article excludes has been the subject of much scrutiny and debate in the context of the GATS and higher education discussions.[27] According to one opinion, Article 1:3 is "unclear, narrow and will likely be interpreted restrictively. It is likely to provide little or no substantive protection for public education".[28] This is because, in order to be excluded, both of the above criteria must apply; given the current Canadian context, as in many other countries, this exclusion is unlikely to exempt the Canadian higher education system from the GATS. For example, the existence of tuition fees, private contracts, donations, and endowments could potentially be viewed as evidence that public post-secondary education in Canada is supplied 'on a commercial basis'. The existence of private, for-profit universities could reasonably be interpreted as meaning that public universities are 'in competition with one or more service suppliers'.

In addition, at the OECD/US Forum on Trade in Educational Services held in Washington, DC in the spring of 2002 bringing together a range of stakeholders involved in trade in education services, the opinion generally expressed was that GATS Article 1:3 is not applicable in the case of higher education. On the other hand, it is generally accepted that this article includes services offered in primary and secondary education sectors.

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[25] AUCC, *Canadian Higher Education and the GATS: AUCC Background Paper,* AUCC, 2001. http://www.aucc.ca

[26] AUCC, *Joint Declaration in Higher Education and the General Agreement on Trade in Services,* 2001.

[27] Knight, Jane, *GATS-Higher Education Implications, Opinions and Questions,* paper presented at the First Global Forum on Globalization and Higher Education, UNESCO, 2002.

[28] Grieshaber-Otto, Jim and Sanger, Matthew, *Perilous Lessons: The impact of the WTO Service Agreement (GATS) on Canada's Public Education System*, Canadian Centre for Policy Alternatives, Ottawa, 2002.

However, according to DFAIT trade officials, Article 1:3 is "self-defining" and, therefore, could exempt different services in each different country. These officials also point out that the exercise of defining the 'services offered under government authority' would only happen if a WTO partner country launches a trade dispute against Canada.

2. What are the key concerns with respect to Canada limiting its lack of commitments to 'public education'?

At the present time, Canada has made no requests for market access and has made no conditional offer in *public education* services. In practical terms and at the present time, this definition has been interpreted very broadly by DFAIT trade negotiators to include 'education services' writ large given the lack of consensus among provinces about what constitutes public and private education and the lack of pressure from most Canadian educational providers to open up the sector.

However, the key concern in future negotiations with limiting Canada's definition of education and lack of commitments to 'public education' is that, as mentioned in question 1, sub-sectors such as higher education, adult education and "other" are not clearly defined as 'public'. The Canadian higher education system is generally understood to be of a more mixed public-private nature and thus has dimensions which could be considered commercial and that could be targeted for special treatment. For example, certain aspects of education offered by Canadian universities like computer and information technology training, adult education and training, or business education, could arguably be excluded from more traditional 'non-commercial' forms of university education. If openings are made in the education services sector with respect to 'private' or 'commercial' education services in which Canadian universities and colleges are involved, this could open them up to the GATS disciplines. The implications of this scenario will be examined more fully in question 5. Therefore, it is important that Canada maintain as broad a definition of education services as possible for the overall mixed public services in education.

3. How is the Canadian higher education system protected given Canada's current negotiating position under GATS?

As indicated in question one, many analysts agree that it is unlikely that higher education will be excluded from services covered under GATS Article 1:3. Assuming this is true, the Canadian higher education system is only protected due to the lack of commitments in Canada's schedule and the Canadian government's publicly stated position not to put "public education" on the negotiating table.

4. What is the impact of the most favoured nation treatment rule on education services?

As was mentioned earlier, MFN treatment applies to all services, except those excluded under Article 1:3, despite the absence of national commitments. MFN treatment implies that GATS members are entitled to conditions of access equal to the most favourable given to any other nation.

In the case of education services, it implies that although Canada has not identified commitments, MFN could still play a role and have an impact on the treatment of foreign private, for-profit institutions. In the current context, provinces have the authority to grant licenses and confer degree-granting status to all providers of education services. A few provinces have already allowed foreign educational institutions to operate within their territory. Although these openings fall outside of trade agreements, the MFN treatment still applies as provinces cannot discriminate on the basis of country of origin and what they have extended to foreign institutions from one country must be permitted to a foreign institution from another country. Nevertheless, foreign institutions must abide by all domestic rules and regulations that provinces have in place to offer training within their territory and new providers would be under the same restrictions as current foreign private, for-profit entities are now. According to one legal advisor, the MFN treatment rule would be subject to provincial boundaries as education is a provincial jurisdiction.[29]

According to discussions with DFAIT trade officials, the current weight of the MFN treatment rule is not very strong because it is not backed up by commitments in the education sector. Therefore, it will be possible to restrict, change or prohibit access to our education market without having to compensate other countries for the loss if it appears that the problems are arising with respect to MFN treatment.

However, the main concern remains that, in the long term, MFN obligations could be interpreted as possibly promoting "liberalization through the back door". The decision to open doors to one foreign for-profit provider must be informed by the broader context of trade agreements where MFN treatment opens similar possibilities to all member countries. Practically speaking, it would be difficult to retract the current privileges given to specific countries by some Canadian provinces. The division between foreign and domestic policy is a false divide in today's environment. Changes in domestic education policy should be informed by the foreign trade and policy context given that there is a strong dynamic between the two.

5. What could happen if Canada lists education services or an education sub sector in its schedule of commitments?

Although Canada has maintained a publicly stated position that 'public education', and in practice, that education services more broadly will not be put on the negotiating table, it is important to keep in mind the intrinsic dynamic of progressive liberalization within the GATS regime. There will be continuing pressure from other countries, as well as possibly from other industry sectors in Canada to open up new sectors and lift existing restrictions. The two main concerns with listing education services are related first to national treatment and access to subsidies.

5.1 If Canada makes full commitments in education services (or a sub-sector such as higher education, adult education or other education services) without listing any restrictions, national

[29] In the GATT context, many provincial and state measures were successfully challenged in the landmark case of the Canada-U.S. "beer wars". The fact that a particular American state or Canadian province had to allow foreign products the best available treatment within its own jurisdiction did not affect any other state's or province's jurisdiction. For more information see *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, 18 February 1992, DSA17/R, 39A/27; United States- Measures Affecting Alcoholic and Malt Beverages, 19 June 1992. DS23/R, 39S/206.*

treatment and market access regulations would apply.[30] A legal advisor consulted by AUCC has confirmed that, if there is an attempt to narrow the definition of *public* education services and make commitments in the higher education sub-sector, this could lead to universities and colleges becoming fully open to GATS disciplines. National treatment could put at risk:

1. Restriction of public subsidies to Canadian public and not-for-profit institutions only;

2. Restriction of degree-granting authority to Canadian institutions only;

3. Restriction of 'consumption subsidies' (i.e. student loans and scholarships) and research subsidies to Canadian citizens and landed immigrants;

4. Local hiring preferences (i.e. preference giving to Canadian university professors);

5.2 *Access to subsidies*: If Canada lists education in its schedule of commitments without any restrictions, the government might not be able to restrict access to subsidies to domestic service suppliers due to the national treatment rule.

There is currently no clear definition of subsidies in the GATS context due to the absence of a subsidies discipline.[31] Considering this absence of clear rules, the WTO suggests that countries indicate in the schedule of commitments that subsidies are not available (unbound) to foreign suppliers in those services where a country has made market-access commitments.[32] DFAIT officials have confirmed that if Canada lists education in its schedule of commitments, it would seek a horizontal limitation on access to public subsidies for public education and health services. Otherwise, a possible outcome could be that the government would have to subsidize private-for-profit foreign-owned higher education institutions or cease subsidizing higher education in this way at all.

5.3 *Export subsidies*: A subsidies discipline would also define 'unfair' subsidies. Article XV of the GATS requires members to enter negotiations with a view to developing the necessary multilateral disciplines to counter trade distorting effects caused by subsidies. There is no set deadline to negotiate this discipline, although the U.S. and other countries could push for these in on-going negotiations. It appears that, at this point, the negotiations are stalled given the difficulty in defining the nature of trade distorting subsidies in services. Export subsidies could be of concern as Canadian universities continue to expand their international activities and compete abroad to deliver education services such as satellite campuses, twinning programs, corporate training and distance education. The financial support they are receiving from the Canadian government for core operations could potentially be interpreted as an unfair subsidy by a private, for-profit foreign provider competing in the same overseas market, and such a provider could possibly launch a trade dispute. However it has been suggested by DFAIT that the scope of this problem would likely be small compared to other trade disputes, and would likely not be pursued by another country.

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[30] Canada has listed several horizontal restrictions in its schedule of commitments that by definition apply to all sectors. That being said, our analysis is illustrative of long term consequences of trade liberalization in higher education that relates to the overarching commitment to remove restrictions in further rounds of negotiations of the GATS.

[31] The economic concept of a subsidy is usually defined broadly as a benefit conferred on a firm or a product by government.

[32] WTO, *GATS Facts and Fiction*, http://www.wto.org.

If a subsidy regime was adopted, given the fact that approximately 2/3 of Canadian universities' operating budgets come from government funding, the Canadian higher education system could become the target of a number of challenges in the context of exporting services abroad. The softwood lumber dispute with the U.S. government and the issues of stumpage fees set by the American government is instructive here. It is important to recall that high subsidization of local institutions is listed by the WTO has being one of the trade barriers in education services.

6. If Canada makes commitments in education services, what could be the impact of Article VIII on Monopolies and Exclusive Service Suppliers?

Article VIII prevents government sanctioned monopolies and exclusive services suppliers from subsidizing competition in a sector listed in Canada's schedule. Commitments in education services could bring this article into play. Canadian universities could be considered to have a monopoly in certain areas such as undergraduate liberal arts and social sciences programs, but be in competition with private-for-profit providers for other services such as adult education and training programs.

As with university systems in most developed countries, the structure of Canadian university finance is complex and varies from region to region and institution to institution. Canadian universities generally use a "fund accounting system" which allows them to distinguish between resources which have a designated purpose and those which support a broader array of university activities. [33] The general operating fund provides support to many of the primary activities of all universities. It is used by universities to finance teaching and student support services, assist faculty in their research, and support all administrative, library and computing facilities required on campus. Provincial grants and tuition fees are the primary sources of operating revenues for universities. Canadian universities' internal financing schemes are based on an internal equalization adjustment. Programs are financed from the core budget regardless of how much students contribute to the university. Considering that certain programs are in competition with private suppliers- such as the adult education programs that are being offered at lower costs than in the private sector- it could be viewed as a monopoly partially subsidizing competitive activities. This cross-subsidization of programs could be a target under the GATS regime if Canada lists education services or certain sub-sectors.

The example under NAFTA is instructive here where United Parcel Service is suing Canada for US $ 160 million arguing that Canada's publicly funded network of mail boxes and post offices is subsidizing its courier service and gives Canada Post an unfair advantage over private sector courier companies.[34] Article VIII could force universities to segregate their profit-making operations (i.e. adult education and training) from their non-profit making activities for which they enjoy monopoly status (i.e. general undergraduate arts and sciences education). This cross-subsidization of university activities is serving the public interest in the sense that activities are funded according to need and not solely on the basis of their cost-recovery capacity. Therefore a possible consequence of this segregation of funds could be diminished financial support for public education and basic arts and science programs.

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[33] For more information on the structure and sources of university funding, please consult *Trends in Higher Education,* AUCC, 2002.

[34] Although the GATS does not have an equivalent to NAFTA's Chapter 11, which sets conditions for a private company to sue a country in the case of a trade dispute, this example helps to understand how the GATS prevents the use of public funds to subsidize commercial activities under Article VIII on Monopolies and Exclusive Service Suppliers.

7. What measures exist within the GATS to limit the negative impact on the Canadian higher education system if commitments were made in this sector?

If Canada were to make commitments in education or an education sub-sector, there are various degrees of liberalization in the commitments that Canada could include in its schedule. In the event that education is listed as a sector, Canada could impose restrictions to market access and national treatment by listing, for example, public subsidies, scholarships and grants as exempted from national treatment. Restrictions could also be listed according to provinces and may include restrictions on the number of service suppliers, and the participation of foreign capital.

However, experts have expressed concerns related to the effectiveness of such measures. Once the sector in on the table, it is a 'slippery slope' and there will be on-going pressures to scale down the limitations to national treatment and market access or to remove them in subsequent rounds of negotiations.

Part VI. Other Sectors of Interest with Implications for Canadian Universities

Although Canada is currently not making commitments in education services, it is important to understand the implications that commitments in related sectors (although intended to be self-exclusive) could have on education services and Canadian universities. To this end, we have identified three sectors where Canadian universities are active and could feel the impact of the GATS binding resolutions.

1. Research and development services

Research and development services include activities related to natural sciences and engineering, social sciences and humanities, as well as interdisciplinary research and experimental development. To date, Canada has only scheduled commitments in the areas of social sciences (including law and economics) and humanities (except linguistics and languages). In 1999, Canada exported $3.21 billion worth of research and development services, accounting for more than 10 percent of Canada's total commercial services exports.[35]

1.1 What is the role of Canadian universities in the R&D sector in Canada?

According to AUCC, Canadian universities play a critical role in our national R&D system. Canadian universities perform 33% of all national R& D activity, and account for 31% of R&D jobs and 21% of gross R&D expenditures in Canada. They also have well-established links with industry which sub-contracts about 5% of its R&D work to universities and finances about 12% of other university R&D work. These university-industry collaboration figures are particularly significant because they represent the highest percentage of contribution among all G-7 countries.

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[35] DFAIT, *Description of Requests Presented by Canada to its WTO Partners*, http://strategis.ic.gc.ca

Because of the strong links built between Canadian universities and the private sector, it is more and more difficult to differentiate where the "pure" research activities (funded exclusively by public funds and aimed only at better understanding the world in which we live) end and where the contractual research activities (funded exclusively by the private sector and intended to lead into commercialization) begin. In fact, in most of our university laboratories, many research projects are pursued together and are closely related to one another, sharing staff, students, laboratory equipments and other resources. While some of these projects are publicly funded (through research grants) and some others privately funded (through research contracts), many are supported both by public and private funds.

1.2 What are Canada's requests and offers in this sector?

Canada will request that its trading partners remove impediments such as requirements to use local partners to provide services or to hire local citizens.[36]

1.3 What are the opportunities for Canadian universities?

DFAIT officials have noted that Canada's offensive interest in this sector is to request access to other countries for Canadian researchers while sustaining Canada's capacity to attract research.

When looking at the four modes of supply, opportunities would include[37]:

- An R&D service undertaken by an organization in Canada for a client in another country;
- A Canadian organization making use of a R&D service in another country;
- A Canadian organization setting up a presence in another country to provide R&D services;
- An individual traveling from Canada to supply R&D services in another country.

1.4 What are the potential risks for Canadian universities?

1.4.1 Considering the mixed nature of funding of university research and the various mandates that these research projects are pursuing, university research funding could be a target for private R&D service providers. It may be argued that a Canadian university providing R&D services has an unfair advantage given its access to publicly funded research facilities. This cross-subsidization of activities may also bring into play the monopoly article mentioned earlier. Public subsidization of universities research activities could also be a target if it leads to export of a product developed with the help of public funds, as it is often the case in the university context.[38] Foreign private companies that argue that they cannot compete with the "subsidized" exports could possibly launch a trade dispute related to this issue. This scenario could force universities to segregate their publicly and privately funded research activities.

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[36] Ibid

[37] Industry Canada, *Research and Development Services Industry: A Discussion Paper in Preparation for the WTO and GATS Negotiations,* http://strategis.ic.gc.ca.

[38] This has been raised as potential issue of concern for Canadian companies receiving support under the Industrial Research Assistance Program at the National Research Council Canada, WTO-R&D Subsidies and I.P presentation to I.N.I.S.T., October 2002.

1.4.2 Another major concern would be access by foreign private research firms to research grants from, for example, publicly funded granting agencies. However, Canada has made a horizontal restriction to national treatment and market access for subsidies in research and development in its current schedule of commitments. This horizontal limitation prevents access to research and development subsidies across all service sectors. Therefore, according to DFAIT officials, public research subsidies in any sector would not be available to foreign research institutions setting up a commercial presence in Canada.

1.4.3 Canadian private enterprises receive financial incentives when they contract research out to Canadian universities. One possibility is that under the GATS, companies could contract their research to foreign universities and still receive the R&D tax credits. At the same time, this could give opportunities to Canadian universities to obtain research contracts from firms located abroad.

1.4.4 Intellectual property rights are also a major concern in the research and development service sector. These rights are protected under the *Trade-Related Aspects of Intellectual Property Rights* (TRIPS). The TRIPS Agreement is one element of the Uruguay Round, the package which also created the World Trade Organization. As such, it came into force with the WTO on January 1, 1995. It sets out the rules that members of the WTO must follow in setting up systems to protect intellectual property rights within their borders specifying, for example, that such rights must be granted to foreign innovators in the same measure as they are to domestics (national treatment), and that nationals of no particular WTO Member country must be favoured over those of others (non-discrimination). The Agreement is unique among the WTO rules in that it is positively proscriptive. That is, all other WTO rules describe what countries may not do, while TRIPS describes what countries must do. The fact that TRIPS is part of the WTO means that any member of the WTO must follow its structures.[39]

1.4.5 Another concern for the R&D service sector is the application of security restrictions to the export of technology. GATS Article XIV *bis* provides "security exceptions" meaning that members are not required to disclose any information that is considered contrary to security interests and can take any action necessary to the protection of security interests. The U.S is already placing a lot of its leading edge technological development under 'a national security umbrella' which is not subject to international trade negotiations. While a given technology may have originated under the security umbrella, it can find its way into the commercial world and still remain under that umbrella.[40]

2. Professional services

Professional services include legal services, accounting, auditing and bookkeeping services, taxation services, architectural services and urban planning, and landscape architectural services. Many of these services require individual practitioners to be accredited, certified and/or licensed, and to hold a professional title to exercise the right to practice.

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[39] See http://www.wto.org, TRIPS.

[40] Industry Canada, *Research and Development Services Industry: A Discussion Paper in Preparation for the WTO and GATS Negotiations*, op.cit.

The Canadian professional service sector, led largely by the engineering, architectural, and management consulting professions, has experienced continuous growth in international activities of about 20 percent per year (6$ billion in 1999) over the last 10 years. The capabilities and expertise of Canadian professional services providers are recognized and sought after worldwide, reflecting the fact that this sector is competitive and well place to take advantage of international opportunities.[41]

2.1 What is the role of Canadian universities in professional services?

The overall scope of consulting activities by Canadian university faculty members is unclear, but anecdotal evidence suggests it is a growing phenomenon. Professors in urban planning and architecture schools, administration departments, as well as engineering departments can bid for contracts with private firms, NGOs and government. Faculty members also contribute their expertise to society through other avenues, for example, by means of consulting or advice to government, the private sector or NGOs. Academics from many disciplines are frequent consultants to companies and occasionally move from the academic to the private sector themselves to commercialize the discoveries they have made within the university. University researchers also provide their services to governments or NGOs, for example in the development of policy, by appearing as expert witnesses in parliamentary hearings, producing solicited research papers for policy makers, or exploring the ramifications of discoveries across the full spectrum of social, natural and health sciences.

Unfortunately, there is relatively little quantitative information available on the kinds of knowledge transfer beyond the teaching and research activities of faculty members. No single collection of data tracks, for example, the nature or frequency of academic advice to parliamentary committees or to community organizations. At an anecdotal level, however, it is clear that this is a routine and often fruitful means of transferring academic expertise to the broader community and of making an informed contribution to public debate on significant issues of the day.

Some U.S. scholars have begun to address this gap in tracking, and their data offer some partial indicators of interest. For example, the percentage of U.S. faculty members reporting earnings from consulting ranges from 15.4 percent in the humanities to 32.7 percent in engineering[42]. Similarly, faculty members reporting by discipline spend as much as 30 percent of their time on such activities as consulting, community service, legal or medical services, or other activities beyond their teaching, research and administrative responsibilities.[43] Even if the work environment of U.S. and Canadian faculty is not directly comparable (due to differences in the details of collective agreements in the two countries and the restrictions that faculty in Canada may face in their contract activities as a result of more stringent rules on conflict of interest and conflict of commitment) it is reasonable to expect some similarities in the profiles of Canadian and U.S. faculty.[44]

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[41] DFAIT, *Description of Requests Presented by Canada to its WTO Partners*, op.cit.
[42] National Center for Education Statistics, *National Survey of Postsecondary Faculty: 1999*, Data Analysis System.
[43] National Center for Education Statistics, *National Survey of Postsecondary Faculty: 1999*, Background Characteristics, Work Activities, and Compensation of Faculty and Instructional Staff in Postsecondary Institutions: Fall 1998.
[44] For more information on knowledge transfer, please see chapter 5 in Trends *in Higher Education,* AUCC 2002.

2.2 What are Canada's requests in this sector?

Canada will request that its trading partners improve their commitments for professional services through the elimination of trade barriers related to, for example, temporary entry regulations, investment and ownership limitations, and nationality and citizenship requirements.[45]

2.3 What are the potential risks for Canadian universities?

One possible scenario is that foreign competitors may argue that Canadian university professors, acting as consultants, have an unfair advantage due to being able to draw on university resources. For example, anecdotal evidence suggests that professors might involve their students in preparing proposals for contract bids. A professor from an architecture and urban planning department may rely on his Master's students to help him prepare bidding proposals for private contracts. In addition, professors acting as consultants may work from their university office, thus reducing the indirect costs that private firms must built in their proposals. On the other hand, contracts may provide university students with work placements and can raise the profile of that department/university within the industry. This issue is already being raised in the Canadian context where some private firms are complaining that Canadian university professors have an unfair advantage when conducting consulting activities for the private sector.

A legal advisor consulted by AUCC suggests that Canadian universities would likely not be liable for the activities of their faculty in this context, but a country could bring forth a trade dispute. According to DFAIT trade negotiators, this is really an issue of definition but likely not a key concern as the GATS categories are meant to be self-exclusive and that a "person can wear more than one hat". That is, a person can be a university professor and a consultant and for the purposes of the GATS, these two categories do not necessarily overlap. It was also suggested that the scope of this problem would likely be small compared to other trade disputes, and would likely not be pursued by another country.

2.4 What are the opportunities for Canadian faculty members acting as consultants?

Opportunities would be the same as for other professional consultants. The GATS could facilitate recognition of professional accreditation and facilitate cross-border professional mobility. Professors traveling abroad to work would most likely not be wearing their 'professor hat' but their 'consultant hat'.

3. Computer and related services

According to the WTO, computer and related services include consultancy services related to the installation of computer hardware, software implementation services, data-processing services, and other computer services including data preparation services and training staff of clients.[46]

In 1999, foreign revenues of the Canadian computer and related services sector reached $2.3 billion, accounting for 13.2 % of total revenues.[47]

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[45] DFAIT, *Description of Requests Presented by Canada to its WTO partners*, op.cit.
[46] WTO, *Computer and Related Services: Background Note by the Secretariat*, July 1998. http://www.wto.org
[47] DFAIT, *Description of Requests Presented by Canada to its WTO Partners*, op.cit.

3.1 What are Canada's requests in this sector?

Canada will request that its trading partners improve their commitments by eliminating limitations in the participation of foreign capital (e.g. in terms of the maximum percentage limit of foreign shareholding or on the total value of individual or aggregate shareholding) and by eliminating restrictions that limit the duty-free exemption from import duties applicable to the production of goods in the sector to domestic producers. Canada will also request that countries made broad commitments for all sub-sectors of computer and related services, if they have not already done so.

3.2 What are the potential implications for Canadian universities?

The key concern relates to the issue of "training staff of clients" outlined in the definition of the sector and whether this could be viewed as an area where universities are actively involved and could be seen to be in competition with foreign computer training service providers.

DFAIT officials have confirmed that the training component in this category is very specifically aimed at, for example, situations where software has been sold by a computer firm to a client and they are required under the contract of sale to train the client's staff on how to use it.

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